

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

BRENFORD ENVIRONMENTAL
SYSTEM, L.P.,

Plaintiff,

v.

CIVIL 09-01036 (JA)

PIPELINERS OF PUERTO RICO, INC.,
A/K/A THE OIL & GREASE COMPANY,
INC.; ENDURANCE REINSURANCE
CORPORATION OF AMERICA; JOHN
DOE; ABC CORP.; AND XYZ
INSURANCE COMPANY,

Defendants

OPINION AND ORDER

This matter is before the court on two motions to compel production of documents filed by plaintiff, Brenford Environmental Systems, L.P., against the defendants Pipeliners of Puerto Rico, Inc. ("Pipeliners"), filed on May 24, 2010 and against Endurance Reinsurance Corporation of America ("ERCA"), filed on June 1, 2010. (Docket Nos. 41 and 43.) Pipeliners did not file an opposition to the motion to compel. ERCA filed an opposition to plaintiff's motion on June 16, 2010. (Docket No. 44.) For the reasons stated below, plaintiff's motion to compel production against Pipeliners is GRANTED and plaintiff's motion to compel production against ERCA is DENIED.

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4 BACKGROUND

5 Pipeliners was awarded the bid for a sewer rehabilitation contract by the
6 Puerto Rico Aqueduct and Sewer Authority ("PRASA") for the cleaning and
7 inspection of the Miramar Sanitary Sewer Main (the "Project"). Plaintiff and
8 Pipeliners entered into an agreement where plaintiff leased to Pipeliners the
9 equipment and consultants required to complete the Project. (Docket No. 1, at
10 5, ¶ 9.) According to plaintiff, Pipeliners was contractually obligated to make
11 lease payments for the rented equipment, consultant fees and miscellaneous
12 expenses associated with the cleaning and inspection of the sewer main. (Id. at
13 7, ¶ 15.)

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16 Pipeliners obtained a Surety Bond from ERCA to guarantee payment to all
17 subcontractors. According to plaintiff, the Surety Bond enables plaintiff to collect
18 payment from Pipeliners or ERCA. Plaintiff filed this action against Pipeliners and
19 ERCA on January 13, 2009, alleging that they are jointly and severally liable for
20 the amount of the invoices and damages due to Pipeliners' alleged breach of
21 contract. Pipeliners counterclaimed alleging breach of contract against plaintiff
22 and to recoup the amount already paid to plaintiff in the form of rental payments
23 and the deposit.

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26 The parties filed a Joint Discovery Conference Report with this court on
27 August 26, 2009. According to the report, document requests and interrogatories
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4 were to be served by October 1, 2009 and answers were to be served within 45
5 days or by November 16, 2009. (Docket No. 31, at 2.) On a joint motion, on
6 May 27, 2010, this court extended the discovery deadline to September 15, 2010.
7 (Docket No. 42.)
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9 1. Motion to Compel Production Against Pipeliners

10 Plaintiff sent a document request to Pipeliners on October 20, 2009.
11 Pipeliners had 45 days to respond, but plaintiff received no response. On
12 December 7, 2009, plaintiff sent a letter to Pipeliners requesting a response to the
13 discovery request; again plaintiff received no response. The parties had a
14 conference call on January 21, 2010, during which Pipelines assured plaintiff that
15 it would receive a response to its document request by the beginning of the
16 following week. When plaintiff received no response, it sent yet another letter to
17 Pipeliners on February 2, 2010, again seeking a response. Pipeliners responded
18 on February 3, objecting to many of the requests, and not providing plaintiff with
19 any documents until February 9, when counsel conferred to discuss the objections.
20 On February 11, 2010, after reviewing the documents received on February 9,
21 plaintiff confirmed that the response was incomplete and requested the remaining
22 documents.
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26 On February 26, 2010, plaintiff sent a letter to Pipeliners outlining its
27 opposition to Pipeliners' objections to the document request. First, plaintiff argued
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3 that the objections were waived due to Pipeliners' delay in responding to the
4 document request. Second, even if the objections are not waived, they are
5 without merit because they are conclusory and do not explain the basis of the
6 objection. Lastly, plaintiff requested that the parties meet to discuss the
7 discovery issues.
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10 Pipeliners agreed to meet and after plaintiff made several attempts to
11 schedule a conference to resolve the discovery dispute, Pipeliners responded and
12 a meeting was held on April 14. On April 16, 2010, plaintiff sent a letter to
13 Pipeliners confirming the agreement reached at the April 14 meeting. Pipeliners
14 agreed to provide additional documents by May 14, 2010. On May 13, 2010,
15 plaintiff provided Pipeliners with an extension until May 21. As of May 24, 2010,
16 the date of this motion, plaintiff has not received the agreed upon documentation
17 from Pipeliners.
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20 2. Motion to Compel Production Against ERCA

21 Plaintiff sent a document request to ERCA on October 28, 2009. ERCA
22 responded on December 18, 2009. Several discovery issues were subsequently
23 raised by both parties. In ERCA's response to plaintiff's request for production of
24 documents, ERCA objected to many requests based on relevance. On January 5,
25 2010, plaintiff sent a letter to ERCA objecting to the response to plaintiff's
26 document request. On March 30, ERCA reaffirmed its objections and notified
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3 plaintiff that it objected to several of plaintiff's responses to ERCA's interrogatory
4 requests. ERCA suggested that the parties meet to discuss the discovery
5 disputes. The next day, plaintiff agreed and a conference was held on April 5,
6 2010.
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9 On April 6, plaintiff sent a letter to ERCA summarizing the resolution. ERCA
10 agreed to provide additional documents, while plaintiff agreed to amend its
11 responses to ERCA's interrogatory requests; no deadline was imposed. On
12 May 21, 2010, plaintiff provided ERCA with its amended responses and requested
13 the additional documents from ERCA. On May 27, 2010, the court approved a
14 joint motion to extend the discovery deadline to September 15, 2010. Plaintiff
15 then filed the instant motion on June 1, 2010. ERCA opposed the motion on
16 June 16, 2010.
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19 DISCUSSION

20 Pursuant to Federal Rule of Civil Procedure 34(a)(1), "[a] party may serve
21 on any other party a request within the scope of Rule 26(b): (1) to produce and
22 permit the requesting party . . . to inspect, copy . . . any designated documents
23" Fed. R. Civ. P. 34(a)(1)(A). Subsection (b)(2)(A) of Rule 34 requires that
24 "[t]he party to whom the request is directed must respond in writing within 30
25 days after being served. A shorter or longer time may be stipulated to under Rule
26 29 or be ordered by the court." Fed. R. Civ. P. 34(b)(2)(A). In this case, the
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Joint Discovery Report allowed the parties to respond within 45 days. (Docket No. 31, at 2.) Subsection (b)(2)(B) further requires that “[f]or each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.” Fed. R. Civ. P. 34(b)(2)(B).

Rule 37(a)(3)(B) of the Federal Rules of Civil Procedure allows “[a] party seeking discovery [to] move for an order compelling . . . production This motion may be made if . . . (iv) a party fails to respond that inspection will be permitted . . . as requested under Rule 34.” Fed. R. Civ. P. 37(a)(3)(B)(iv). Plaintiff filed two motions requesting that this court order the defendants, Pipeliners and ERCA, to produce documents responsive to plaintiff’s request for documents.

A. Motion to Compel Against Pipeliners

Pursuant to Local Rule 7(b), “[u]nless within fourteen (14) days after the service of a motion the opposing party files a written objection to the motion, . . . the opposing party shall be deemed to have waived objection.” Local Rules of the U.S. Dist. Court for the Dist. of P.R. Rule 7(b). The defendant did not file an opposition, therefore any objection is waived.

Plaintiff’s motion to compel requires the determination of several issues. First, plaintiff argues that Pipeliners’ objections to the request for production of

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documents are waived as they were untimely. Next, plaintiff argues that even if the failure to timely object is excused, Pipeliners has not sufficiently explained its justification for the objections. Pipeliners' objections are based on the ground that the request is "vague, overly broad and unduly burdensome." (Docket No. 41-4, at 1.) Finally, plaintiff requests that this court order Pipeliners to produce the requested documents as Pipeliners has agreed.

Again, under Rule 34(b)(2)(B) a party is required to state that the documents will be produced or state the objection to the request, including the reasons. Fed. R. Civ. P. 34(b)(2)(B). It is within the court's discretion to determine that "[i]f the responding party fails to timely object or state the reason for the objection, he or she may be held to have waived any objections." Rivera v. Kmart Corp., 190 F.R.D. 298, 300 (D.P.R. 2000) (citing Marx v. Kelly, Hart & Hallman, P.C., 929 F.2d 8, 12 (1st Cir. 1991)); see also Krewson v. City of Quincy, 120 F.R.D. 6, 7 (D. Mass. 1988) (quoting Slauenwhite v. Bekum Maschinenfabriken, GMBH, 35 Fed. R. Serv. 2d 975 (D. Mass. 1983)) ("If a party fails to file timely objections to document requests, such a failure constitutes a waiver of any objections which a party might have to the requests. 'Any other result would ... completely frustrate the time limits contained in the Federal Rules and give a license to litigants to ignore the time limits for discovery without any adverse consequences.'") (citations omitted).

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4 It is clear that failure to comply with Rule 34(b) does not automatically
5 result in waiver of an objection; it is within the court's discretion to decline to
6 compel the production of requested documents even if a timely objection is not
7 made. Rivera v. Kmart Corp., 190 F.R.D. at 300. ("A party's slip . . . will not
8 necessarily short-circuit his or her efforts to preserve a privileged document
9 confidential.") Although it may be possible for the court to find good cause and
10 excuse the failure to timely object, such as on privilege grounds, an objection that
11 a request is "vague, overly broad and unduly burdensome" is the type of objection
12 that is waived by a party's failure to timely object to the document request.
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15 Krewson v. City of Quincy, 120 F.R.D. at 7.

16 Pipeliners was served with a document request on October 20, 2009.
17 Pursuant to the Joint Discovery Conference Report, a response should have been
18 sent to plaintiff within 45 days. Pipeliners did not communicate with plaintiff
19 regarding a response until January 21, 2010, where at such time, Pipeliners
20 assured plaintiff that a response was forthcoming. After plaintiff sent another
21 inquiry to Pipeliners on February 2, it finally responded to plaintiff's document
22 request on February 3, 2010, 61 days late. It is clear that Pipeliners waived its
23 objections by not objecting in a timely manner, as required by Rule 34(b)(2).
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Alternatively, even if Pipeliners was able to persuade the court that its failure to timely object should be excused¹, its objections are insufficient. Rule 34(b)(2)(C), requires that "[a]n objection to part of a request must specify the part and permit inspection of the rest." Fed. R. Civ. Proc. 34(b)(2)(C). As plaintiff argues, objections based on the ground that the request is "vague, overly broad and unduly burdensome" are without merit.

"Asserting a general objection to a request for production of documents does not comply with Rule 34(b) of the Federal Rules of Civil Procedure." Rivera v. Kmart Corp., 190 F.R.D. at 301; see also Bank of Mongolia v. M&P Global Fin. Servs., Inc., 258 F.R.D. 514, 519 (S.D. Fla. 2009), reconsideration denied, 2009 WL 3294810 (S.D. Fla. Oct. 13, 2009) ("Objections that state that a discovery request is 'vague, overly broad, or unduly burdensome' are, standing alone, meaningless and fail to comply with . . . Rule 34's requirement that objections contain a statement of reasons.") "It is well settled that:

[t]he party resisting production bears the burden of establishing lack of relevancy or undue burden
[T]he "mere statement by a party that the interrogatory [or request for production] was 'overly broad, burdensome, oppressive and irrelevant' is not adequate to voice a successful objection." . . . "On the contrary, the party resisting discovery 'must show specifically how . . . each interrogatory [or request for production] is not

¹ Pipeliners has not proffered any reason for its delay in responding to plaintiff's discovery requests, nor did it file an objection to this motion.

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relevant or how each question is overly broad, burdensome or oppressive.'""

Aponte-Navedo v. NALCO Chem. Co., ___ F.R.D. ___, 2010 WL 2000317, at *5 (D.P.R. May 20, 2010) (quoting Sánchez-Medina v. UNICCO Serv. Co., 265 F.R.D. 24, 27 (D.P.R. 2009) (quoting St. Paul Reinsurance Co. v. Commercial Fin. Corp., 198 F.R.D. 508, 511-12 (N.D. Iowa 2000) (citations omitted))).

In light of Pipliners' failure to timely object to plaintiff's document requests or to provide specific reasons for its objections, the court holds that Pipeliners' objections to the requests are waived.

Furthermore, Pipeliners has not provided any excuse for its failure to produce the requested documents. Since the document request was filed, Pipeliners has not complied with any deadline; not the 45 days allowed by the Federal Rules, nor deadlines that were mutually agreed-upon, and not even self-imposed deadlines. The court expects that self-imposed deadlines and mutually agreed upon dates will be met. See Cintrón-Lorenzo v. Departamento de Asuntos del Consumidor, 312 F.3d 522, 526 (1st Cir. 2002) (quoting Tower Ventures, Inc. v. City of Westfield, 296 F.3d 43, 47 (1st Cir. 2002)) ("[w]hen a litigant . . . proposes a compliance date, the court is entitled to expect that the litigant will meet its self-imposed deadline.").

Plaintiff's motion to compel production of documents as to Pipeliners is GRANTED.

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4 B. Motion to Compel Against ERCA

5 Plaintiff requests that this court order ERCA to produce all documents it
6 failed to provide in its initial response and those that the parties agreed upon at
7 the April 5 meeting. Plaintiff concludes that "due to the continuing delay tactics
8 and non-compliance, [plaintiff] has no other alternative but to seek assistance
9 from this Honorable Court" (Docket No. 43, at 3, ¶ 9.) Plaintiff does not
10 allege that ERCA failed to comply with a specific deadline or was non-responsive
11 to its requests.
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14 Alternatively, ERCA argues that the motion should be denied because
15 plaintiff has not complied with Local Rule 26, which requires that a moving party
16 make "a reasonable and good-faith effort to reach an agreement with opposing
17 counsel on the matters set forth in the motion." Local Rules of the U.S. Dist.
18 Court for the Dist. of P.R. Rule 26(b). "Local Rule 26(b) and Federal Rule of Civil
19 Procedure 37(a)(1) requires that before filing a motion to compel, the moving
20 party has to certify that it 'has made a reasonable and good-faith effort to [try
21 and solve the discovery dispute] with opposing counsel' without the court's
22 intervention." Aponte-Navedo v. NALCO Chem. Co., ____ F.R.D. ____, 2010 WL
23 2000317, at *10 (quoting Local Rules of the U.S. Dist. Court for the Dist. of P.R.
24 Rule 26(b)).
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4 To date, ERCA has produced over 1,000 pages of documents, has shown a
5 good faith effort in resolving the discovery disputes evidenced by its consistent
6 communication with plaintiff and has agreed to produce additional documents.
7 Although plaintiff certifies that "it has made reasonable and good faith efforts to
8 reach an agreement with opposing counsel . . . in compliance with Local Rule 26,"
9 (Docket No. 43, at 3, ¶ 9), I find that they did not. Plaintiff does not offer
10 evidence to substantiate its certification, nor the claim that ERCA has engaged in
11 "continuing delay tactics." Moreover, in ERCA's opposition to the motion, it asserts
12 that it is working on its amended responses and they are forthcoming. Therefore,
13 plaintiff's motion to compel production of documents against ERCA is DENIED.
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CONCLUSION

In view of the above, plaintiff's motion to compel production against
Pipeliners is GRANTED and plaintiff's motion to compel production against ERCA
is DENIED.

SO ORDERED.

At San Juan, Puerto Rico, this 2d day of August, 2010.

S/ JUSTO ARENAS
Chief United States Magistrate Judge